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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1076

EMERY AIR FREIGHT CORPORATION,

Petitioner,

vs.

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, and HARRY DAVIDOFF, Secretary-Treasurer, and JOHN MORAN and MICHAEL HUNT, Shop Stewards of Local 295,

Respondents.

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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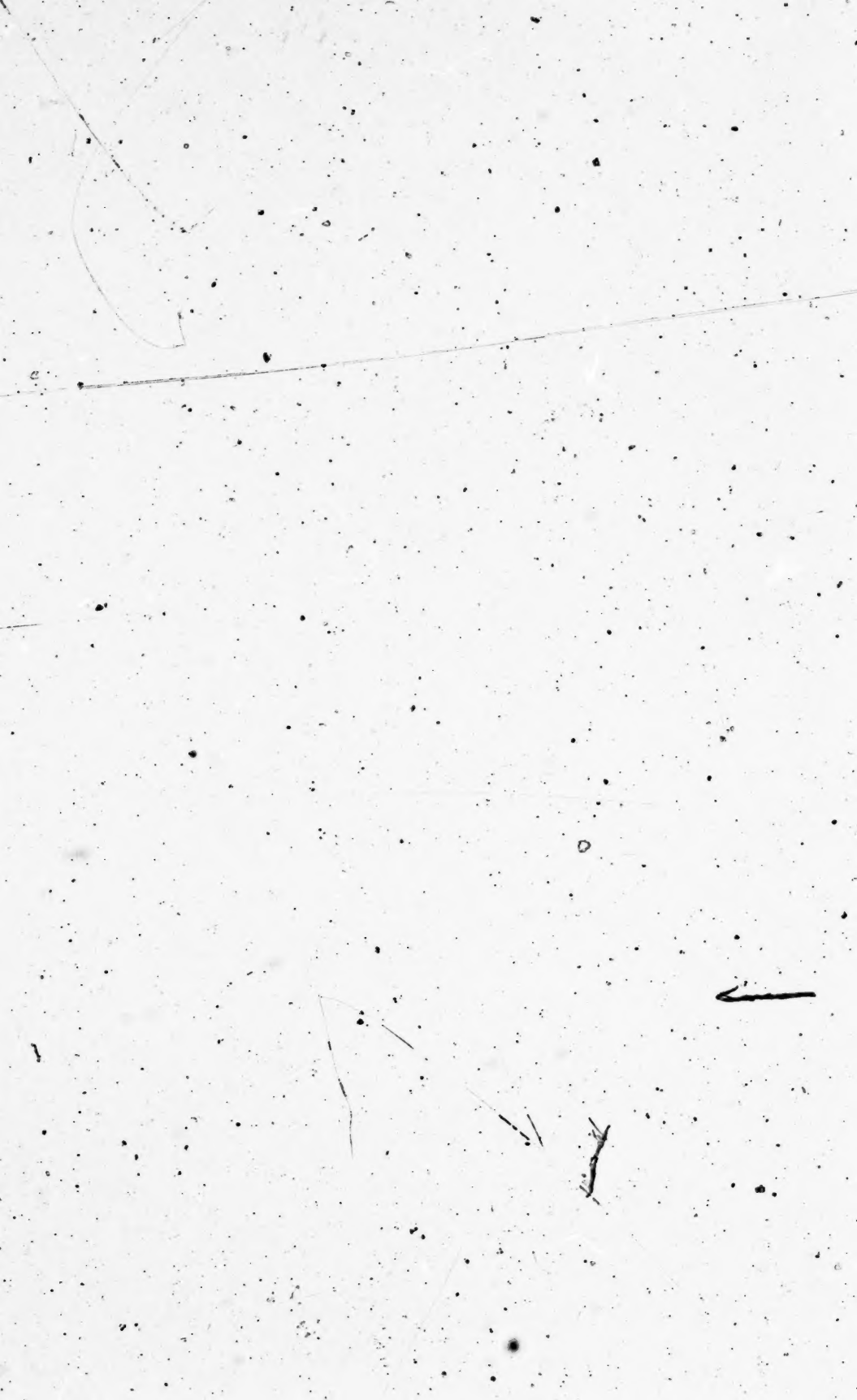

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
The 1970 Contract Negotiations	3
The Labor Dispute	4
Proceedings in the District Court	5
The Decision of the Court of Appeals	6
Reasons for Denying the Writ of Certiorari	6
Conclusion	10

Authorities

Cases

Associated General Contractors v. Illinois Conference of Teamsters, F.2d (7th Cir. Doc. No. 18729, January 31, 1972)	8
Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970)	6, 7, 8, 9
New York Telephone Co. v. Communications Workers of America, 445 F.2d 39 (2d Cir. 1971)	8

PAGE

Standard Foods Corp. v. Brandenburg, 436 F.2d 964 (2d Cir. 1970) 8

Simplex Wire and Cable Co. v. Local 2205, IBEW, 314 F. Supp. 885 (D.N.H. 1970) 8

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 7

United States Steel Corp. v. United Mine Workers, F.2d (3d Cir. Doc. Nos. 19,454-19,481, February 3, 1972) 8

Statutes

Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151 *et seq.* 2

Labor-Management Relations Act, 29 U.S.C. § 185 .. 2

Norris-La Guardia Act, 29 U.S.C. §§ 101 *et seq.* 2

Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104 ..... 6, 7

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Opinions Below

The Findings of Fact, Conclusions of Law and Order Granting Preliminary Injunction of the United States District Court for the Eastern District of New York (Petition, pp. 5a-14a) were not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (Petition, pp. 15a-34a)[1] is reported at 449 F.2d 586.

[1] References to the Court of Appeals opinion as reprinted in the Appendix to the petition will be abbreviated "C.A., p. ". Similarly, references to the Findings, Conclusions and Order of the District Court as reprinted in the Appendix to the petition will be abbreviated "D.C., p. ".

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

Whether, as concluded by the Court of Appeals, the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, prohibits a federal District Court from granting injunctive relief against a strike or work stoppage in a labor dispute where the issue, found by the Court to be nonarbitrable, is whether any collective bargaining agreement exists between the parties to the dispute.

Statutes Involved

Pertinent provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151 *et seq.*, and of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, are adequately set forth in the petition.

Statement of the Case

The petition in this case arises out of an action commenced, pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, by petitioner, Emery Air Freight Corporation (hereinafter referred to as "Emery") seeking damages and injunctive relief for alleged violations of the no-strike clause of a collective bargaining agreement claimed by Emery to be in effect between it and Local Union 295, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 295").

The 1970 Contract Negotiations

Emery and Local 295 have had an established collective bargaining relationship for many years. As noted in the petition, Local 295 is the recognized collective bargaining representative of three units of Emery's employees in the New York metropolitan area, including a unit of Emery's truck drivers and platform men. Prior to commencement of the negotiations involved herein, Emery and Local 295 were parties to a collective bargaining agreement covering truck drivers, helpers and platform men which was effective from November 30, 1967 to December 1, 1970 (Record on Appeal, pp. 4a, 26a, 149a, 218a-219a).[2]

Throughout November and early December, 1970, the parties engaged in negotiations looking toward a new agreement covering drivers, helpers and platform men (R. 5a, 26a, 219a-234a). Local 295 represents employees of a number of employers in the air freight industry in addition to Emery and, in the past, the collective bargaining agreements which it has negotiated in the New York area have been uniform as to all the various employers (R. 35a). The negotiations with Emery were therefore coordinated with simultaneous negotiations with other air freight companies.

In December, 1970, representatives of Local 295 submitted to Emery a two-page "Supplemental Agreement" (R. 15a-16a) containing a number of basic proposed provisions relating to the economic aspects of the proposed new agreements and advised Emery that the document was being signed by other air freight employers (R. 5a, 26a, 228a-232a). After some delay, the document was executed

[2] References to the Record on Appeal will be abbreviated "R." followed by the page number or numbers.

by Emery and returned to the Union with the understanding that Local 295 would prepare a final agreement incorporating the provisions of this "Supplemental Agreement" (R. 228a-232a).

The Labor Dispute

The significance of this "Supplemental Agreement", executed in December, 1970, lies at the heart of the dispute which developed between Emery and Local 295. Emery took the position that the December agreement, together with the 1967-70 agreement, constituted the entire final agreement of the parties and that its execution represented the conclusion of negotiations (R. 65a). Local 295, on the other hand, has consistently taken the position that the December document was simply a basic understanding respecting economic issues with more negotiation still to come on contract language and other non-economic issues (R. 65a). One of the most important of these non-economic issues, from the point of view of Local 295, was clarification of the language respecting the grievance procedure, including the provisions concerning arbitration (R. 34a-36a, 65a).

In early April, 1971, Local 295 provided Emery with a complete printed final form of agreement (R. 5a-6a, 26a, 233a-234a, 249a). Representatives of Emery reviewed this form, concluded that, in their opinion, it did not accurately reflect the agreement of the parties, and requested a meeting with Local 295 negotiators (R. 6a, 27a-28a, 249a-250a). The meeting took place on April 22, 1971. At this meeting, Emery officials expressed their view that the document did not embody the agreement of the parties but, according to Company witnesses, Local 295 negotiators insisted that the

agreement was being signed in that form by the other employers and that, if Emery did not sign it, members of Local 295 would strike immediately (R. 7a, 28a, 38a-39a, 149a-151a, 248a, 251a-252a, 256a-257a, 287a-288a). Emery persisted in its refusal and, at approximately 11:45 a.m., the Union commenced its strike (*Id.*).

Proceedings in the District Court

Counsel for Emery immediately began preparation of the complaint, motion for temporary restraining order and supporting papers in this case (R. 297a). At approximately 10:30 p.m. on April 22nd, without notice to Local 295 or the individual defendants, counsel for Emery appeared before Judge Mishler of the Eastern District of New York, and obtained a temporary restraining order prohibiting the strike activity and setting the cause for hearing on Emery's request for preliminary injunction on April 30 (R. 22a-23a, 297a).[3] On that date, following a hectic flurry of court activity, including efforts by Local 295 to have the restraining order vacated and a contempt proceeding, the District Court granted a preliminary injunction banning further strike activity. The District Court's formal Findings of Fact and Conclusions of Law are dated June 11, 1971 and the injunction itself is dated June 22, 1971 (D.C., pp. 5a-14a).

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[3] The Court of Appeals, in its decision (C.A., pp. 25a-26a), called attention to numerous substantive and procedural defects in the restraining order including its failure to require arbitration, its failure to limit its restraint to a five-day period, the inadequacy of the bond required of Emery, the issuance of the order upon affidavits rather than upon oral testimony under oath, and the failure of Emery, in its moving papers, to certify its efforts to give notice.

Among the findings of fact of the District Court were findings that the parties had, contrary to the contention of Local 295, entered into a new collective bargaining agreement on or about December 15, 1970, and that the new agreement consisted of the 1967-70 agreement as modified by the December 1970 agreement (D.C., p. 7a). It was not alleged by Emery, and the District Court did not at any time hold, that the strike was over an arbitrable grievance, nor did it order arbitration as a condition to granting Emery the requested injunctive relief.

The Decision of the Court of Appeals

The Court of Appeals held that "the major dispute between the parties was whether a new contract existed" and that that dispute was not arbitrable (C.A., pp. 24a-25a). Relying on this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), the Court of Appeals reversed.

Reasons for Denying the Writ of Certiorari

It is conceded by Emery that this case arises out of a labor dispute, and the District Court itself specifically so held (R. 64a). That being true, the injunctive relief sought by Emery is barred by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, unless the case falls within the narrow exception to that section's otherwise absolute prohibition of injunctive relief in non-violent labor disputes established in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970).

Prior to this Court's decision in *Boys Markets*, the law was settled that the anti-injunction provisions of Section 4 of the Norris-LaGuardia Act precluded federal courts from enjoining strikes even though assertedly in violation of a no-strike clause of a collective bargaining agreement which also provided for binding arbitration of the dispute concerning which the strike was called. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). In *Boys Markets*, the Court overruled *Sinclair*, holding that a federal court may enjoin strikes in certain circumstances which the Court was at pains to delineate and circumscribe:

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." (398 U.S. at 253-54).

The Court, adopting the view of the dissenting opinion in *Sinclair*, set out specific principles to guide lower federal courts in determining when equitable relief is appropriate:

> "A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to

> arbitrate, as a condition of his obtaining an injunction against the strike." 370 U.S. at 228, 8 L. ed. 2d at 460. (Emphasis in original). (398 U.S. at 254.)

Thus, the Court clearly held that injunctive relief is appropriate if, and only if, the dispute concerns a grievance subject to a mutually binding arbitration agreement, and, even then, only if the order granting the injunction also requires that both parties submit the matter to immediate arbitration.

The federal courts have had no difficulty in applying the clearly-stated standards of *Boys Markets*. Those courts, other than the District Court in this case, which have directly considered the question have uniformly held that the fundamental prerequisite in a §301 suit for anti-strike injunctive relief, is a finding that the strike is over an arbitrable dispute. See, *e.g.*, *Associated General Contractors* v. *Illinois Conference of Teamsters*, F.2d (7th Cir., Doc. No. 18729, January 31, 1972); *United States Steel Corp.* v. *United Mine Workers*, F.2d (3d Cir. Doc. Nos. 19,454-19,481, February 3, 1972); *New York Telephone Co.* v. *Communications Workers of America*, 445 F.2d 39, 51 (2d Cir. 1971); *Standard Foods Corp.* v. *Brandenburg*, 436 F.2d 964 (2d Cir. 1970); *Simplex Wire and Cable Co.* v. *Local 2205, IBEW*, 314 F. Supp. 885 (D.N.H. 1970).

Both the District Court (R. 64a-65a) and the Court of Appeals (C.A., p. 24a) recognized that the essential dispute between the parties was whether a new contract did or did not exist. That conclusion is inescapable upon this record and Emery does not challenge it in its petition. The District Court, though it professed to be following the guidelines of *Boys Markets* (R. 65a-66a), never made any finding as to

whether that dispute is an arbitrable one. The Court of Appeals specifically held that it is not arbitrable (C.A., pp. 24a-25a).

The power of an arbitrator to render a binding decision in a dispute is necessarily dependent upon the prior existence of an agreement to be bound by the arbitrator's decision. It follows that where, as here, the dispute involves the question of the *very existence of any agreement at all, (including any agreement to arbitrate)* there is nothing upon which an arbitrator can act. This is underscored by the failure of the District Court to order arbitration in conjunction with its grant of equitable relief, as required by *Boys Markets.*

Nor did this Court, in *Boys Markets*, make the question of an employer's entitlement to anti-strike injunctive relief dependent upon the correctness or incorrectness of the union's position as might ultimately be determined by a federal District Court sitting far removed from the pressures, tensions and urgency of the day-to-day problems of the collective bargaining relationship. Instead, the test established by *Boys Markets* is whether or not the underlying dispute is an arbitrable one. In this way, the Court was attempting to harmonize the federal anti-injunction policy of Norris-LaGuardia with the national labor policy favoring settlement of industrial disputes by arbitration, without undermining the vitality of either policy. The Court of Appeals decision in this case is in full accord with *Boys Markets* and with the policy embodied in that decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID SCRIBNER
Counsel for Respondents

March 17, 1972